THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

RECEIVED
JAN 08 2024
SC Court of Appeals

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, Dominique Powell, Jennifer Mayo and James Hardy.......................... Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. ....Appellant.

FINAL BRIEF OF APPELLANT

Robert H. Jordan, Esq.
PARKER POE ADAMS & BERNSTEIN, LLC
850 Morrison Drive
Suite 400, Charleston, SC 29403
Phone: (843) 727-2650

John W. Fletcher, Esq. (S.C. #69550)
Phillip S. Ferderigos, Esq. (S.C. #16709)
BARNWELL WHALEY PATTERSON & HELMS, LLC
211 King Street, Suite 300 (29401)
PO Drawer H
Charleston, SC 29402
Phone: (843) 577-7700 Fax: (843) 577-7708
Counsel for Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

A. Factual Background 2

1. The Master Deed and Short-Term Rentals at Mariner's Cay 2

2. The Temporary Moratorium on Short-Term Rentals 5

B. Procedural History 7

1. The Pleadings and Reference to the Master-in-Equity 7

2. The Motions Filed in the Circuit Court 10

3. The Orders at Issue in this Appeal 13

ARGUMENT 16

A. Standard of Review 16

B. The Circuit Court Erred in the Subject Orders Because the Master Deed Prohibits Short-Term Rentals to Transient Guests 17

1. Under South Carolina Law, the Short-Term Rental of Accommodations to Transient Guests Is a "Business Activity," Not a "Residential Use" 18

a. The Short-Term Rental of Mariner's Cay Units Violated the "Residential Use" Restriction in the Master Deed, Which is Limited to Dwelling at a Location With Some Permanency (Not Mere Transient Lodging) 19

b. The Short-Term Rental of Units to Transient Lodgers at Mariner's Cay Is a Prohibited "Business Activities" Under the Master Deed 22

C. The Trial Court Should Have Dismissed Plaintiffs' Claims Because They Could Only Challenge the Temporary Moratorium Via a Derivative Action 27

1. The Nonprofit Corporation Act Precludes Plaintiffs' Claims as Pleaded, Because They May Only Challenge Corporate Actions of the HOA as Ultra Vires Via a Derivative Action.........27

2. Contrary to Plaintiffs' Anticipated Argument, They Are Truly Claiming Ultra Vires Actions of the HOA and its Board.........29

D. Even If Plaintiffs Are Correct That Their Amended Complaint Alleges Intra Vires Actions, the Circuit Court Erred in Failing to Apply the Business Judgment Rule.........31

E. Irrespective of Whether Short-Term Rentals Are Permissible Residential Uses, the Temporary Moratorium Was a Valid and Enforceable Corporate Action of the HOA.........33

F. None of the Plaintiffs Who Owned Their Properties at the Time the Temporary Moratorium Was First Enacted Possess Standing to Assert Any Claims.........37

G. The Claims of Plaintiffs Sellars and Powell Must Fail Because They Purchased Their Properties With Record Notice of the "Temporary Moratorium".........41

H. In the Alternative (and Particularly in Light of Its Ruling on Plaintiffs' Motion to Amend the Complaint), the Circuit Court Should Have Deferred Ruling on the Parties' Motions for Summary Judgment and Permitted the HOA to Engage in Full Discovery.........42

CONCLUSION.........46

TABLE OF AUTHORITIES

CASES

Auto Owners Ins. Co. v. Langford,
330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998)....................20

Baughman v. AT&T,
306 S.C. 101, 410 S.E.2d 537 (1991)....................42

Baumann v. Long Cove Club Owners Ass'n,
380 S.C. 131, 668 S.E.2d 420 (Ct. App. 2008)....................32

Brooks v. Northwood Little League, Inc.,
327 S.C. 400, 489 S.E.2d 647 (Ct. App. 1997)....................16

Brown v. Spring Valley Homeowners Ass'n,
2016 S.C. App. Unpub. LEXIS 406 (Ct. App 2016)....................36

Buddin v. Nationwide Mut. Ins. Co.,
250 S.C. 332, 157 S.E.2d 633 (1967)....................20

Cafe Assocs., Ltd. v. Gerngross,
305 S.C. 6, 406 S.E.2d 162 (1991)....................16

Commander Health Care Facilities, Inc. v. South Carolina Dep't of Health & Envtl. Ctrl.,
370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006)....................38

Cook v. State Farm Auto. Ins. Co.,
376 S.C. 426, 656 S.E.2d 784 (Ct. App. 2008)....................20

Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund,
138 S. Ct. 1061 (2018)....................35-36

Dockside Assocs. v. Detyens,
291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987),
aff'd, 294 S.C. 86, 362 S.E.2d 874 (1987)....................31

Eager v. Peasley,
322 Mich. App. 174, 911 N.W.2d 470 (2017)....................26

Erie R. Co. v. United States,
240 F. 28 (6th Cir. 1917)....................36

Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.,
415 S.C. 256, 781 S.E.2d 903 (2016)....................27, 33

Freemantle v. Preston,
398 S.C. 186, 728 S.E.2d 40 (2012) 38

George v. Fabri,
345 S.C. 440, 548 S.E.2d 868 (2001) 16

Georgetown Cty. League of Women Voters v. Smith Land Co.,
393 S.C. 350, 713 S.E.2d 287 (2011) 37

Goddard v. Fairways Dev. Gen. P'ship,
310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993)..32

Hall v. Fedor,
349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)..41

Hamilton v. CCM, Inc.,
274 S.C. 152, 263 S.E.2d 378 (1980) 17-18

Harbit v. City of Charleston,
382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009)..16

Hardy v. Aiken,
369 S.C. 160, 631 S.E.2d 539 (2006) 18

Hensley v. Gadd,
560 S.W.3d 516 (Ky. 2018)..26

Jackson v. Swordfish Invs., LLC,
365 S.C. 608, 620 S.E.2d 54 (2005) 16

Jackson v. Bermuda Sands, Inc.,
383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009)..16

Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,
307 S.C. 339, 415 S.E.2d 384 (1992) 42

Kadel v. North Carolina. State Health Plan Teachers & State Employees,
12 F.4th 422 (4th Cir. 2021) 35

Kinard v. Richardson,
407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014)..17

Lockhart v. United States,
577 U.S. 347 (2016)..35

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..37

MacFarlane v. Manly,
274 S.C. 392, 264 S.E.2d 838 (1980) 16

Matsell v. Crowfield Plantation Cmty. Servs. Ass'n,
393 S.C. 65, 710 S.E.2d 90 (Ct. App. 2011)...17

Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995)...16

Moore v. Barony House Restaurant, LLC,
382 S.C. 35, 674 S.E.2d 500 (Ct. App. 2009)...16

Ex parte Morris,
367 S.C. 56, 624 S.E.2d 649 (2006) 37

Ex parte Morrow,
183 S.C. 170, 190 S.E. 506 (1937) 19

Pandharipande v. FSD Corp.,
No. M2020-01174-COA-R3-CV,
2022 Tenn. App. LEXIS 172, at *16-18 (Ct. App. Apr. 29, 2022) 25-26

Powell v. Bank of Am.,
379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008).. 37-38

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,
368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006)...17

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,
384 F.3d 157 (4th Cir. 2004) 18

Richardson v. South Carolina Farm Bureau Mut. Ins. Co.,
336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999)...20

Rife v. Hitachi Constr. Mach. Ltd.,
363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005)...16

Schmidt v. Courtney,
357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)...42

Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.,
345 S.C. 594, 550 S.E.2d 287 (2001) 38

Shipyard Prop. Owners' Ass'n v. Mangiaracina,
307 S.C. 299, 414 S.E.2d 795 (Ct. App. 1992)...17

Matter of Estate of Smith,
419 S.C. 111, 796 S.E.2d 158 (Ct. App. 2016)....42

South Carolina Dep't of Natural Res. v. Town of McClellanville,
345 S.C. 617, 550 S.E.2d 299 (2001)....17

South Carolina Pub. Interest Found. v. City of Columbia,
431 S.C. 164, 847 S.E.2d 257 (Ct. App. 2020)....22

Spence v. Spence,
368 S.C. 106, 628 S.E.2d 869 (2006)....41-42

State v. Pilot Life Ins. Co.,
257 S.C. 383, 186 S.E.2d 262 (1972)....36

Taylor v. Lindsey,
332 S.C. 1, 498 S.E.2d 862 (1998)....17

Trost v. Sea Mark Tower Prop. Owners Ass'n,
No. 2004-UP-284,
2004 S.C. App. Unpub. LEXIS 313, at *6 (Ct. App. Apr. 29, 2004)....29

Village W. Horizontal Prop. Regime v. International Sales & Mktg. Grp.,
No. 2007-UP-111,
2007 S.C. App. Unpub. LEXIS 134 (Ct. App. Mar. 7, 2007)....32

Williamson v. Bermuda Run Investor Devel. Grp.,
2006 WL 7286063 (Ct. App. June 13, 2006)....28

STATUTES/RULES/REGULATIONS

S.C. Code § 4-1-170....22

S.C. Code § 12-36-920....25

S.C. Code § 27-31-120....21

S.C. Code § 33-31-302....33

S.C. Code § 33-31-304....28

S.C. Code § 33-31-801....27, 34

S.C. Code § 33-31-830....31-32

S.C. Code § 30-9-40....41

Rule 23, SCRCP....28

Rule 56, SCRCP..16, 41

Rule 65, SCRCP..14

Fed. R. Civ. P. 56..40-41

Folly Beach Code of Ord. § 117.01..23

Folly Beach Code of Ord. § 117.03..24

Folly Beach Code of Ord. § 117.04..24

Folly Beach Code of Ord. § 113.02..24

Folly Beach Code of Ord. § 113.03..24

STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in granting Plaintiffs' Motion for Summary Judgment and concluding that short-term rentals to transient lodgers did not violate the subject Master Deed, which permits only "residential uses" and prohibits "business activities"?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in declining to follow the better-reasoned line of cases holding that short-term rentals are business/commercial uses of property, not residential.

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in granting Plaintiffs' Motion for Summary Judgment where Plaintiffs asserted that the HOA acted *ultra vires*, but did not bring suit derivatively?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in failing to apply the business judgment rule?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in failing to rule that the Temporary Moratorium was a proper exercise of the HOA Board's authority under the Nonprofit Corporation Act and the HOA's governing documents?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in failing to rule that any Plaintiff who owned property prior to July 1, 2019 lacked standing?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in ruling that Plaintiffs who purchased property after July 1, 2019 could assert claims notwithstanding record notice of the Temporary Moratorium?

SUGGESTED ANSWER: *Yes.*

Did the trial judge err in failing to permit the HOA to engage in further discovery before granting the requested relief?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Factual Background

This lawsuit involves, *inter alia*, the enforceability of a temporary moratorium that Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.'s ("HOA") Board of Directors duly enacted (and renewed) concerning short-term rentals. Plaintiffs[1] claim that the Temporary Moratorium violated South Carolina law and was unenforceable. The HOA responded that its short-term rental moratorium was proper and valid under South Carolina law. On March 29, 2023, the Court of Common Pleas of Charleston County granted Respondents' Motion for Summary Judgment and for Injunctive Relief, and denied the HOA's Motion for Summary Judgment. (*See generally* R. pp. 6-36). In addition, the Court permitted Respondents to amend their Complaint. (*See id.*). For the following reasons, this Court should reverse and vacate the trial court's grant of relief to Respondents.

1. The Master Deed and Short-Term Rentals at Mariner's Cay

Mariner's Cay Racquet & Yacht Club ("Mariner's Cay") is a gated condominium community with over 135 separate units ("Unit") located in Folly Beach, South Carolina. (*See* R. p. 195 ¶ 6). A May 11, 1982 Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Master Deed") governs Mariner's Cay. The Master Deed provides that "[e]ach Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes

[1] In the initial complaint, the original Plaintiffs were identified as: Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ron Woolf, Rabecca Woolf, Nancy Zai, Meg White, Ginger Adler, Gerry Murphy, Sam Ogden, Joey Winchester, Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Jenn Odom, Brianna Stello, and Leslie Kelly. As discussed herein, in connection with the motions that are at issue in this appeal, Plaintiffs were granted leave to amend their complaint to include only the following Plaintiffs: Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, and Dominique Powell. These Plaintiffs named in the Amended Complaint are the appropriate Respondents in this appeal.

constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be . . . leased." (*See* R. p. 210 ¶ III.2).

The Master Deed also includes a number of provisions regulating owners' rental of their property. For example, the Master Deed provides that *entire*[2] "[u]nits may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors." (*See* R. p. 229 ¶ IX.7). The Master Deed authorizes the HOA's Board of Directors to "promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee." (*See* R. p. 213 ¶ III.3.e). Moreover, all "tenants, and each and every occupant of each Apartment Unit shall at all times observe the published rules of conduct which may be established from time to time by the Association or its Board of Directors." (*See id.* R. p. 263 ¶ VII.4).

Under the HOA's governing documents, "[b]uildings and all Units contemplated in the development shall be, and the same hereby are, **restricted exclusively to residential use.**" (*See* R. p. 227 ¶ IX.1 (emphasis added)). Moreover, the Master Deed **prohibits any business activities** at Mariner's Cay:

> No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. **No business activities of any kind whatever shall be conducted in any building or in any portion of the property**; provided, however, the foregoing covenants shall not apply to the business activities, signs and billboards of Granter, its agents or assigns during the construction and sale period

---

[2] That provision also states that "[n]o less than all of a Unit may be rented." This language demonstrates that the Master Deed did not intend to allow transient lodging akin to a hotel, boarding house, or bed & breakfast.

(*See* R. p. 228 ¶ IX.4 (emphasis added)). The By-Laws require that Unit owners renting Units must notify the HOA's secretary of the name of the renter. (*See id.*, Ex. G thereto (By-Laws) ¶ III.1). Furthermore, the Master Deed limits the use of common areas to immediate family members, a limited number of guests, and/or tenants who **reside** in the Unit Owner's apartment.

Traditionally, Mariner's Cay has been a residential community, whose owners are primary or secondary homeowners. (*See* R. p. 196 ¶ 8). Over the years, a minority of owners of condominium units at Mariner's Cay have increasingly rented their units on a short-term basis, often for a period of one week or less. (*See id.* ¶ 9). During the peak rental season of mid-May through mid-September, approximately 3,000 renters come through the small Mariner's Cay community. (*See id.*). These rentals have often been made to vacationers who do not reside in the Lowcountry and who have no ties to this area. (*See id.* ¶ 10). In connection with these short-term rentals, renters seek access to and use of Mariner's Cay's common areas and amenities, including the swimming pool. (*See id.* ¶ 11). As a result, permanent residents of Mariner's Cay are frequently exposed to and interact with short-term renters. (*See id.* ¶ 12).

It has been Mariner's Cay experience that such short-term renters have frequently engaged in conduct that is loud, boisterous or otherwise disturbing to the permanent residents of Mariner's Cay. (*See id.* ¶ 13). Short-term renters often leave messes in common areas that make life unpleasant for permanent residents. (*See id.* ¶ 14). The presence of short-term rentals has dramatically increased the number of unfamiliar people with no ties to the community who have been at Mariner's Cay. The short-term rental activity is causing security issues for the HOA and its owners in this gated community. (*See id.* ¶ 15). All of this has had a detrimental impact on the HOA's Common and Limited Areas and Facilities and on the owners' ability to enjoy their units and the amenities of Mariner's Cay.[3] (*See id.* ¶ 16).

---

[3] In addition to the negative impacts short-term rentals have on the character and quality of life at Mariner's Cay, there are other ways in which short-term rentals harm the HOA. For example, the number of short-term rentals can negatively impact the cost (and even the availability) of insurance coverage for the HOA. If the number of short-term rentals continues to

Overall, the presence of short-term renters has changed the character of Mariner's Cay in a negative way. As the number of short-term renters at Mariner's Cay has increased, complaints have been on the rise about, among other things, parking violations, excessive noise, gate damage, litter, increased burden on property management and Board Members, and overcrowding of amenities by non-owners. (*See* R. pp. 196-97 ¶ 17).

The rental of units to short-term renters is frequently operated like a business. (*See* R. p. 197 ¶ 18). Many owners retain companies to manage the short-term rental of their units or engage in active advertising and marketing of their units for short-term rental. (*See id.* ¶ 19). Owners of short-term rentals typically need to engage in work to clean and prepare their units between rentals; third-party companies who manage the short-term rental of units often do this work. (*See id.* ¶ 20). Owners of short-term rentals often contract with cleaning companies to maintain their units between lodgers. (*See id.* ¶ 21). These contracted cleaning services frequently operate and create noise in the early morning hours, often on weekends or outside of business hours, when contractors are prohibited from working at Mariner's Cay. (*See id.*). These cleaning companies have gate keys and create increased traffic in and around Mariner's Cay. (*See id.*).

2. <u>The Temporary Moratorium on Short-Term Rentals</u>

On May 23, 2019, HOA's Board of Directors adopted a resolution, entitled "Temporary Moratorium of Short-Term Rentals" (collectively referred to herein, along with any subsequent reenactments, as the "Temporary Moratorium"), providing in relevant part:

> WHEREAS a clear majority of the members of the Mariners Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariners Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a **Moratorium shall be placed on all new owners** who have entered into a verifiable offer to purchase Mariners Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or

increase in Mariner's Cay, it may become impossible for the HOA to obtain affordable liability insurance for liabilities relating common areas (if such insurance is available at all).

> occupancy of their respective Mariners Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariners Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariners Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

(*See* R. p. 268 (emphasis added)). Notably, the Temporary Moratorium did *not* restrict the current owners of units at Mariner's Cay from engaging in short-term leasing. Any owner of property purchased before July 1, 2019 would be exempt from that limitation and could rent their property on a short-term basis. To be clear, no named Plaintiff has been prohibited or restricted from engaging in short-term rentals.

On April 27, 2022, the HOA's Board of Directors adopted the most recent[4] version of the Temporary Moratorium, which states in relevant part:

> WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, **to the fullest extent allowable under the Master Deed, the By-Laws and South Carolina law,** the Board of Directors of the HOA has determined that **a Moratorium shall be placed on all new owners** who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration **which in any way violates the Master Deed, Bylaws or governing rules and/or restrictive covenants of the HOA.** This moratorium does not apply to Mariner's Cay unit owners who owned their unit prior to July 1, 2019 or spouses married prior to April 30, 2022 who receive the deed to a Mariner's Cay unit from their spouse. This particular Moratorium shall remain in effect until April 30, 2023 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

(*See* R. pp. 283-287 (emphasis added)). Like all of its prior iterations, the current version of the Temporary Moratorium does *not* apply to owners (like Plaintiffs) who obtained their properties prior to July 1, 2019.

---

[4] In the interim, the Temporary Moratorium was extended by resolutions adopted on March 18, 2020 and April 16, 2021. (*See* R. pp. 271-281).

Since the adoption of the first Temporary Moratorium, Mariner's Cay units have continued to be marketable and to sell. (*See* R. p. 197 ¶ 22). It does not appear that the Temporary Moratorium has had any negative impact on the value or marketability of properties at Mariner's Cay. (*See id.* ¶ 23). In fact, property values of units at Mariner's Cay have increased since the adoption of the first Temporary Moratorium, and sales prices have increased — including the sales prices for the properties of some of the original Plaintiffs. (*See id.* ¶ 24).

This appeal concerns the validity of the Temporary Moratorium and the HOA's authority to enact same within its broad corporate powers.

B. <u>Procedural History</u>

1. <u>The Pleadings and Reference to the Master-in-Equity</u>

The original Plaintiffs — Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ron Woolf, Rabecca Woolf, Nancy Zai, Meg White, Ginger Adler, Gerry Murphy, Sam Ogden, Joey Winchester, Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Jenn Odom, Brianna Stello, and Leslie Kelly — commenced this lawsuit against the HOA on June 24, 2019. (*See generally* R. pp. 40-113). The original plaintiffs alleged that they each "own[] a condominium unit in Mariner's Cay." (*See* R. p. 46 ¶ 4).

Plaintiffs further allege that each had, "in the past rented his or her condominium unit on a short term basis to vacationers, and to further that purpose has marketed and advertised his or her unit online on vacation rental websites and/or applications as being available for such short-term rentals." (*See id.* ¶ 5). Plaintiffs further allege that, "[u]nable to restrict short term rentals lawfully via an amendment to the Master Deed as required, the Board instead announced via an email to the owners on May 28, 2019 that a 'moratorium' on short-term rentals would be imposed." (*See* R. p. 49 ¶ 19). Among other things, Plaintiffs' Complaint prayed for "[a]n Order declaring the herein described actions of Defendant [HOA] to be in breach of the terms of the

Master Deed to which the Association and all owners are declared to be bound." (*See* R. p. 55 ¶ 42(B)). The original Plaintiffs' Complaint requested the following equitable relief:

> 43. A Temporary Restraining Order and/or Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium, and to publish and distribute notification of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed;
>
> 44. An Order providing that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals;

(*See* R. pp. 55-56 ¶¶ 43-44).

On September 9, 2019, the HOA filed its Answer and Counterclaims, denying Plaintiffs' claims. (*See generally* R. pp. 114-131). The HOA additionally asserted a counterclaim against Plaintiffs and third-party claims against HOA "members ... who acquired their Units at Mariner's Cay after July 1, 2019 and who are engaging in short term rental of their Units for periods less than thirty (30) days." (*See* R. p. 123 ¶ 29). The HOA's claims allege that short-term lessors are violating the HOA's governing documents that:

a. limit use of a Unit to "residential use" only; (*See* R. p. 227 ¶ IX.1)

b. do not permit a Residential Association member to use his or her Unit for "business activity of any kind whatsoever"; (*See* R. p. 228 ¶ IX.4)

c. do not permit a Residential Association member to rent to a non-lessee; (*See* R. p. 229¶ IX.7)

d. do not permit a Residential Association member to rent to a lessee who invites non-immediate family members to stay in the Unit and; (*See* R. p. 229 ¶ IX.7)

e. do not permit a Residential Association member to engage in conduct which restricts or encroaches upon the rights of other Unit owners; (*See* R. p. 213 ¶ III.3(e))

f. limit a Unit owner's right to 'assign rights of enjoyment to Common Area and Facilities or Limited Common Area and Facilities only to a "immediate family members", "a limited number of guests", or "tenants who reside" in the Unit owner's Apartment and require the Unit owner provide the Secretary of the Association with written notice of the assignee names before an assignment is made; (*See* R. pp. 213-14 ¶ III.3(e)-(f))

g. require that "no less that all of a unit may be rented." (*See* R. p. 229 ¶ IX.7)

(*See* R. p. 127-28 ¶ 47).

The first count of the HOA's counterclaims and third-party claims seek "a preliminary and permanent injunction against . . . any use of their Units in violation of the Master Deed, By-Laws, the Moratorium or other governing document." (*See* R. p. 128 ¶ 50). The HOA's second count is for breach of contract seeking damages for the short-term lessors' violation of the HOA's governing documents. Finally, the HOA requests a declaratory judgment as to the parties' rights under its governing documents and the Temporary Moratorium.

On January 20, 2020, the Honorable Jennifer B. McCoy entered a Consent Order of Reference to Master-in-Equity. That order noted that this "is primarily an action for equitable relief in the form of injunctive relief and declaratory judgment." (*See* R. pp. 1). That Order further states:

> [T]he parties have jointly agreed to set aside for the time being any and all legal claims which have demanded monetary relief, in order that the Master-in-Equity for Charleston County may first hear and rule upon the equitable claims they have asserted. Plaintiffs and Defendant have agreed that the central issue to be heard by the Master-in-Equity is whether the Board may restrict the short-terms rental of condominium units pursuant to the existing language of its Master Deed and governing documents.
>
> Plaintiffs and Defendant do not waive, abandon or relinquish any of their claims or causes of action, including but not limited to those which seek monetary relief; nor do the parties waive, abandon or relinquish their right to have such claims tried by a jury in Common Pleas court. Instead, they have jointly agreed and consented to set aside any such non-equitable claims temporarily for the purposes

> and aims stated herein, and to have such non-equitable claims addressed at a later time in Common Pleas court if necessary and appropriate.

(*See* R. p. 2). This appeal concerns the grant of equitable relief by the Master-in-Equity pursuant to this reference.

2. **The Motions Filed in the Circuit Court**

On July 8, 2022, the HOA filed its Motion for Partial Summary Judgment, asserting the following grounds:

- The HOA is entitled to summary judgment on Plaintiffs' claims for equitable relief because Plaintiffs' do not have standing to bring this action concerning the short-term rental moratorium. Plaintiffs all owned property prior to the effective date of the moratorium and have not had their ability to rent out their properties on a short term basis infringed in any way. Additionally, Plaintiffs can present no evidence of actual harm supporting standing because there is no evidence of an actionable injury to their property values;
- The moratorium on short-term rentals is proper because such rentals are not a "residential use" and constitute "business activities"; and
- The moratorium on short-term rentals was a proper exercise of the powers of the HOA's Board of Directors and is not ultra vires.

(*See* R. p. 156).

On the same day, the original Plaintiffs filed their Motion for Summary Judgment, asking for an order:

> (1) Declaring the various rights, obligations and legal relations of the parties pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40; specifically, that Defendant's actions as described in the Complaint are and have been repugnant to and in violation of Defendant's recorded Master Deed and the common law of contract in South Carolina jurisprudence;
>
> (2) Granting a restraining order and/or injunction in favor of Plaintiffs, compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium and any amendments or renewals to same, and to publish and distribute notification of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in

accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed; and (sic)

(3) Ordering that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in a manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing, or promoting such units for short-term rentals;

(4) Denying Defendant's motion for summary judgment in this action;

(5) Dismissing Defendant's counterclaim in this action in its entirety with prejudice;

(6) Such other and further relief as may be equitable, reasonable, just and proper.

(*See* R. pp. 158-59).

The parties filed lengthy, detailed briefs setting forth their respective contentions regarding the cross-motions for summary judgment. On July 19, 2022, a hearing was conducted on the parties' summary judgment motions before the Honorable Mikell R. Scarborough, Master-in-Equity. At that hearing, Judge Scarborough held the motions for summary judgment in abeyance to allow Plaintiffs an opportunity to ask for leave to amend their Complaint; he also scheduled a follow up hearing on the merits of the cross-summary judgment motions and the motion to amend the Complaint for September 19, 2022. (*See* R. p. 483:1-486:22).

On August 8, 2022, Plaintiffs filed their Motion to Amend Complaint, proposing to make the following amendments to the original Complaint:

- Removing Plaintiffs George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ginger Adler, Gerry Murphy, Sam Ogden, Frank Duffy, Betty Duffy, Lois Stefan, Jenn Odom and Leslie Kelly because they no longer owned properties in Mariner's Cay or no longer wished to participate;

- Correcting the names of several Plaintiffs; and

- Adding new Plaintiffs Jennifer Sellars and Dominique Powell.

(*See* R. pp. 337-38).

On August 22, 2022, the HOA filed its Memorandum in Opposition to Plaintiffs' Motion to Amend Complaint, arguing that the Amended Complaint was futile because: (a) it challenged actions of the HOA as being *ultra vires*, but was not asserted as a derivative action; (b) the "business judgment rule" precluded the claims therein; and (c) Plaintiffs purchased their properties with record or actual notice of the Temporary Moratorium. (*See* R. pp. 359-67). Additionally, the HOA requested that, if the Court allowed Plaintiffs to amend the original Complaint, it should allow the HOA to conduct discovery:

> The claims of the New Plaintiffs inject a host of novel and material factual issues into this case. Specifically, because these New Plaintiffs purchased their properties after the first Moratorium, their claims raise issues of actual and constructive (record) notice or knowledge of the Moratorium. In order to fairly adjudicate these issues, the HOA must be permitted to engage in discovery. This will include written discovery and document requests. In addition, the HOA will likely need to subpoena documents from realtors, closing attorneys or others who were involved in the New Plaintiffs' acquisitions of their properties. Most importantly, once all documentary discovery is completed, the HOA will need to depose the New Plaintiffs. Before the Court can adjudicate the claims of the New Plaintiffs, the HOA must conduct robust discovery into their acquisitions of property and their knowledge.

(*See* R. pp. 367-68).

On September 19, 2022, Judge Scarborough held oral argument on all then-pending motions: *i.e.,* the parties' cross-motions for summary judgment and Plaintiffs' Motion to Amend. After hearing arguments on the issue, Judge Scarborough expressed his intention to grant Plaintiffs' Motion to Amend the Complaint. (*See* R. pp. 509:18-510:22). Judge Scarborough further stated his intention to grant Plaintiffs' Motion for Summary Judgment and to deny the HOA's Motion for Partial Summary Judgment. (*See* R. pp. 574:20-581:12). Judge Scarborough requested that Plaintiffs' counsel submit a proposed order consistent with his oral statements on the record at this hearing.[5]

---

5 On February 7, 2023, the residents of the City of Folly Beach passed a referendum capping non-resident short-term rental licenses at 800. (*See* https://www.live5news.com/2023/02/08/short-term-rental-licenses-folly-beach-officially-capped-800/). Despite this cap, it is still critical for the HOA to have the ability to regulate short-term rentals in Mariner's Cay. For example, the license cap does limit the number of 72 day-per-year

3. The Orders at Issue in this Appeal

On March 29, 2023, Judge Scarborough entered the Order that is the subject of this appeal and that formally decided the parties' pending motions. (*See generally* R. pp. 6-36). In his detailed Order, Judge Scarborough first granted Plaintiffs' leave to amend their Complaint, for the following reasons:

- The Plaintiffs named in the Amended Complaint had standing to bring this action, even if they themselves were not subject to the Temporary Moratorium, because they owned their properties prior to its effective date;
- The Plaintiffs named in the Amended Complaint had standing, even if they purchased their properties with record notice of the Temporary Moratorium; and
- The HOA was not entitled to conduct discovery as to the new claims by new parties in the Amended Complaint prior to the adjudication of summary judgment.

(*See* R. pp. 10-15).[6]

Judge Scarborough additionally entered summary judgment in Plaintiffs' favor as to their injunction and declaratory judgment claims, and denied the HOA's Motion for Partial Summary Judgment. (*See* R. pp. 15-31).

- The governing documents did not permit the HOA to enact the Temporary Moratorium;
- The short-term leasing of units at Mariner's Cay to transient visitors and vacationers was "residential use," not a prohibited "business activity" under the Master Deed;
- The South Carolina Nonprofit Corporation Act did not authorize the HOA to enact the Temporary Moratorium;
- The "business judgment rule" does not support or validate the Temporary Moratorium; and

---

resident short-term rental licenses. Additionally, groups are seeking to overturn the cap in court or politically.

6 Although Plaintiffs/Respondents did not separately file their Amended Complaint, on April 12, 2023, the HOA filed its Answer to Amended Complaint and Counterclaims. (*See generally* R. pp. 403-21). On May 5, 2023, Plaintiffs filed their Reply to Counterclaims of Defendant. (*See generally* R. pp. 422-27).

- None of the affirmative defenses pled by the HOA applied.

(*See id.*). As a result, Judge Scarborough granted Plaintiffs the following injunctive relief, *inter alia*:

> Pursuant to Rule 65(b), SCRCP, the Court grants Plaintiffs a Temporary Restraining Order compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose a purported "moratorium" on short-term rentals, including by future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1(b) of said Master Deed.
>
> Pursuant to Rule 65(a), SCRCP, the Court grants Plaintiffs a Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose or enforce a purported "moratorium" on short-term rentals and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed.
>
> Defendant may continue to enforce existing covenants in the Master Deed applicable to all rentals, including the provision in Article IX, Section 7 that states "Units may be rented provided the occupancy is only by the lessee and his immediate family."

(*See* R. pp. 31-34). The Court also granted a declaratory judgment to the effect that the Temporary Moratorium is invalid and that "Defendant's unilateral actions in creating and enforcing the moratorium were in violation of the aforementioned Master Deed and the common law of contract in South Carolina jurisprudence." (*See* R. p. 35).

On April 10, 2023, the HOA filed its Motion to Alter or Amend March 29, 2023 Order. (*See generally* R. pp. 386-402). On April 17, 2023, Master-in-Equity Scarborough denied the HOA's Motion to Alter or Amend. (*See* R. pp. 37-39). On May 10, 2023, the HOA timely served and filed the instant Notice of Appeal (attaching copies of the March 29, 2023 and April 17, 2023 Orders). (*See* R. pp. 428-462).

For the reasons that follow, the Court should reverse and vacate Judge Scarborough's March 29 and April 17, 2023 Orders, which: (a) granted Plaintiffs/Respondents leave to file the

Amended Complaint; (b) granted Plaintiffs injunctive and declaratory relief; and (c) denied the HOA's Motion for Partial Summary Judgment.

ARGUMENT

A. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." *Jackson v. Swordfish Invs., LLC*, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005) (*citing George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001)). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 611, 620 S.E.2d at 55-56 (*citing Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991)).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* (*citing Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995)). "'The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.'" *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 779 (Ct. App. 2009) (*quoting George*, 345 S.C. at 452, 548 S.E.2d at 874)). "[S]ummary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom." *Jackson*, 365 S.C. at 608, 611-12, 620 S.E.2d at 56 (*citing MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980)).

Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009) (*citing* S.C.R. Civ. P. 56(c)). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (*quoting Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). Stated otherwise, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

Under these standards, the Court should vacate and reverse the Circuit Court's March 29, 2023 and April 17, 2023 Orders granting Plaintiffs' request for injunctive and declaratory relief and leave to amend and denying the HOA's Motion for Partial Summary Judgment.

B. **The Circuit Court Erred in the Subject Orders Because the Master Deed Prohibits Short-Term Rentals to Transient Guests**

As an initial matter, the subject orders are in error because the Temporary Moratorium only confirms what the Master Deed has prohibited all along. Thus, the question of whether the HOA had the authority to enact the Temporary Moratorium is academic and has no bearing on the outcome in this case. For the following reasons, the Court should have concluded, ordered, and declared that the Master Deed expressly prohibits the short-term rentals at issue in this case.

"Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014) (*quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006)). "Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citation and internal quotation marks omitted). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Id. at 4, 498 S.E.2d at 863-64 (quotation marks omitted). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. *See South Carolina Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "[A] restriction on the use of the property must be

created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). However, "the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

1. Under South Carolina Law, the Short-Term Rental of Accommodations to Transient Guests Is a "Business Activity," Not a "Residential Use."

As set forth above, the Master Deed provides that all Mariner's Cay Units are **"restricted exclusively to residential use."** (*See* R. p. 227 ¶ IX.1 (emphasis added)). Moreover, the Master Deed provides that **"[n]o business activities of any kind whatsoever shall be conducted in any building or in any portion of the property . . . ."** (*See* R. p. 228 ¶ IX.4 (emphasis added)). This language regarding business activities in the Master Deed is plain and unambiguous. Under South Carolina law, the "terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 n. 1 (4th Cir. 2004). There is an ambiguity only if "the terms of the contract [or deed] are reasonably susceptible of more than one interpretation." *See id.* For the reasons that follow, the short-term rental of Units to transient guests — primarily out of town tourists — is not a "residential use," but rather is a "business activity."

As a consequence, Plaintiffs' short-term rental businesses directly violate the Master Deed. The Temporary Moratorium does not take away any contractual or other rights of Plaintiffs (or any other owners). Instead, it merely reaffirms what the Master Deed has always provided: that it prohibits the business of short-term rentals of accommodations to transient lodgers.

a. **<u>The Short-Term Rental of Mariner's Cay Units Violated the "Residential Use" Restriction in the Master Deed, Which is Limited to Dwelling at a Location With Some Permanency (Not Mere Transient Lodging).</u>**

As set forth above, the Mariner's Cay Master Deed strictly "restrict[s]" the use of Mariner's Cay Units "exclusively to residential use." (*See* R. p. 227 ¶ IX.1). For the reasons that follow, the record and the law support that Plaintiffs' short-term rental businesses are not "residential uses" permitted under the Master Deed. The trial court erred in striking down the Temporary Moratorium, which had the effect of only explicitly confirming what the Master Deed always clearly prohibited.

No South Carolina appellate court has definitively ruled upon the question presented here: whether short-term (primarily vacation) rentals on a transient basis constitute a "residential" use under a Master Deed. However, South Carolina Courts have discussed what "residential" means in other circumstances. These cases make clear that — although arising in different circumstances — South Carolina courts would likely construe "residential use" to be one that is of some significant temporal endurance, rather than transient or transitory.

For example, the South Carolina Supreme Court has quoted the legal dictionary definitions of "residential," which requires that dwelling permanently or for an extended period:

> "Residence. Living or dwelling in a certain place *permanently or for a considerable length of time*; The place where a man makes his home, or where he dwells *permanently, or for an extended period of time.*" Black's Law Dictionary, page 1543.
>
> "Resident. Dwelling, or having an abode, in a place *for a continued length of time.*" Webster's New International Dictionary.

See Ex parte Morrow, 183 S.C. 170, 175, 190 S.E. 506, 508 (1937) (emphasis added). These definitions limit "residence" or "resident" to individuals living in a location permanently or for an extended period of time. Under the Black's definition (which the Supreme Court has cited), the short-term rental of Mariner's Cay Unites to transient travelers and vacationers would, as a matter of law, not be a "residential use" of property. By definition, these are short-term rentals of a month or less — many for as little as a weekend.

South Carolina appellate courts have analyzed the definition of a "resident" in determining whether a relative is a "Class I" insured for purposes of stacking (*i.e.*, a "*resident*" relative). In the first Supreme Court decision on the topic, it defined a "resident" relative for purposes of insurance coverage as "a resident of the same household is one, *other than a temporary or transient visitor*, who lives together with others in the same house for a period *of some duration*, although he may not intend to remain there permanently." *See Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 339, 157 S.E.2d 633, 636 (1967) (emphasis added) (citations and internal quotation marks omitted), *quoted in Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 431, 656 S.E.2d 784, 787 (Ct. App. 2008); *accord Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) (holding daughter was not resident relative of non-custodial father where she lived with mother and only occasionally visited father); *Richardson v. South Carolina Farm Bureau Mut. Ins. Co.*, 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999) (holding daughter was not resident relative of parents' house where she moved away as graduate student, maintained residence in another town and kept few items at parents' home); *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998) (holding that claimant was not resident relative of grandmother where she usually lived with mother and only stayed with grandmother when she fought with mother).

This Court should likewise construe "residential use" in the Master Deed to mean permanent or long-term habitation, not temporary vacation accommodation or lodging. Mariner's Cay was not developed as a hotel or vacation resort. It is the permanent residence for a great number of its owners. Traditionally, Mariner's Cay has been a residential community, whose owners are primary or secondary *home* owners. (*See* R. p. 196 ¶ 8).

The record supports that the short-term rentals are inherently different from "residential uses" of property. Short-term rentals at Mariner's Cay are made to vacationers who do not reside in the Lowcountry and who have no ties to the area. (*See id.* ¶ 10). It has been observed at Mariner's Cay that, unlike residential long-term renters — who will be motivated to be courteous to neighbors and exercise care for common property — short-term/vacation renters are

frequently loud, boisterous, disruptive, or otherwise disturbing to Mariners' Cay's true residents. (*See id.* ¶ 13). Short-term renters often leave messes in common areas that make life unpleasant for the residents of Mariner's Cay. (*See id.* ¶ 14).

In the context of a condominium unit in a vacation area, it is clear that the short-term rental is used for more than sleeping and eating in the Unit. Under the Horizontal Property Act, any "lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner in the common elements, both general and limited, appertaining to the apartment without specifically or particularly referring to same." *See* S.C. Code § 27-31-120. Many short-term renters spend much of their time, not in the rented Units, but using Mariner's Cay's amenities (particularly the swimming pool and tennis courts). (*See* R. p. 196 ¶ 11). They are therefore frequently intermingling with permanent residents, which significantly alters their community environment. (*See id.* ¶ 12).

Additionally, the fact that Mariner's Cay is a condominium community exacerbates non-residential nature of short-term rentals. Unlike the short-term rental of a detached, single family home, where neighbors may not be exposed to short-term renters on a regular basis, permanent residents of Mariner's Cay are constantly surrounded in close quarters by people who do not reside there and who are on vacation. This can turn the Mariner's Cay "residential" environment into that of a hotel during spring break or peak season weekends. Strangers are constantly going in and out of Mariner's Cay, who have no long-term ties to the community (beyond a week or even a weekend). This is contrary to the ideal of a residential culture, where residents have security and consistency.

Under Plaintiffs' interpretation of "residential use," a literal hotel would be residential because guests sleep and eat there. Plaintiffs' argument misses the purpose of the "residential use" requirement. The residents of Mariner's Cay do not necessarily care what type of business occurs in Units. Instead, the Master Deed seeks to limit the use of property to residential and eliminate *any business uses* because those uses bring unknown and unvetted people into Mariner's Cay for very short times. Whether those folks are there to sleep or have their taxes

done is irrelevant. What matters is that a significant number of strangers are flooding into Mariner's Cay on a daily basis.

In light of the foregoing, the HOA respectfully submits that the definition of "residential use" under South Carolina law should not be contorted to include transient, short-term stays (primarily by vacation renters). "Residential use" clearly connotes a longer term dwelling in a location, perhaps with an indefinite term and/or intent to remain indefinitely. Therefore, the Court should reverse the trial court's March 29, 2023 and April 17, 2023 Orders.

b. The Short-Term Rental of Units to Transient Lodgers at Mariner's Cay Is a Prohibited "Business Activities" Under the Master Deed.

The Master Deed plainly provides that "[n]o business activities of any kind whatever shall be conducted in any building or in any portion of the property." (*See* R. p. 228 ¶ IX.4). The trial court erroneously concluded that short-term rentals are not "business activities."

Although no South Carolina appellate court[7] has interpreted "business activities" in this context, this Court has held that a student dormitory is a "business" under South Carolina Code § 4-1-170(A) and appropriate for including in an "industrial or business park":

> [T]he parties stipulated the dormitories "engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or property manager." We hold this type of activity is commercial, not residential, in nature. The dormitories engage in continuous commercial activity, are not owner-occupied, and are zoned commercially. The dormitories are classified as commercial properties because they involve the operating and leasing of off-campus accommodations for college students and the provision of specific services, including security, property management, and planned recreational activities. Because the word "business" in its ordinary meaning refers to commercial enterprises or activities, we find the dormitories satisfy the "business" requirement, and their inclusion in the industrial or business park does not violate the South Carolina Constitution or section 4-1-170.

See South Carolina Pub. Interest Found. v. City of Columbia, 431 S.C. 164, 169, 847 S.E.2d 257, 259 (Ct. App. 2020). Likewise, although renters of Units at Mariner's Cay might sleep or

---

7 Cases throughout the country are decidedly split on this issue. As discussed herein, the better-reasoned approach is reflected in the *Pandharipande, Eager,* and *Hensley* cases, which hold that short-term rentals constitute non-residential, commercial/business activities.

eat there, such rentals are clearly a commercial activity. The commercial nature of short-term rentals creates an environment that is more like a tourist accommodation, such as a hotel, than a residential condominium. This shows — or at least creates a genuine issue of fact — that the use of Units for short-term rentals is an impermissible "business activity" under the Master Deed.

Short-term renters behave just like other businesses. They often use professional property managers and advertise using the internet and other resources. They hire professional cleaners and other professional contractors to clean and maintain their Units for rental. They form corporations to operate these businesses. They register as businesses with Folly Beach or the state.[8]

To understand that short-term rentals are business, not residential, activities one can look at how government entities regulate them. For example, Folly Beach's Code of Ordinances heavily regulates the short-term rental of vacation properties, including rentals at Mariner's Cay, in an effort to control the impact from those businesses. The ordinance specifies five purposes of these regulations:

(1) Protect the integrity of the city's neighborhoods and the quality of life of its citizens;

(2) Establish a system to track the short term rental inventory in the city;

(3) To protect the health and safety of occupants of short term rental units;

(4) To ensure a level playing field for individuals in the short term rental market; and

(5) To protect the residential character of the residential districts of the city.

See Folly Beach Code of Ord. § 117.01(a). This ordinance defines "short term rentals" as "[r]esidential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling"; the definition excludes tourist accommodations, including hotels, motels, inns, and bed and breakfasts. *See* Folly Beach Code of Ord. § 117.01(b).

---

[8] Indeed, the City of Folly Beach requires short-term renters to obtain a business license, recognizing that short-term rentals are a business activity.

The Ordinance requires that those engaging in short-term rentals: (a) ***obtain an annual business license*** (Section 117.03(A)).; (b) make an **annual** short-term rental **registration** application (Section 117.03(B)); (c) **pay "local, county, and state taxes, including, but not limited to, sales, use, and accommodations taxes"** (Section 117.03(C)); (d) maintain documentation concerning short-term renters (Section 117.04(A)); and (e) comply with certain regulations concerning special events (Section 117.04(D)-(E)) (emphasis added). These regulations strongly imply that — even if their customers sleep or eat in rented Units — short-term rentals are truly businesses.

Folly Beach also imposes an **accommodations fee** on short-term rentals: "There is hereby levied and imposed a uniform fee of 2% of the gross proceeds derived *from the rental of any accommodation* within the city. The fee shall *not be levied* upon the gross proceeds derived from the *rental of accommodations to a resident.*" *See* Folly Beach Code of Ordinances § 113.03(A) (emphasis added). Folly Beach's Code of Ordinances also provides the following relevant definitions concerning short-term rentals:

> **ACCOMMODATION.** Any room (excluding meeting and conference rooms), campground spaces, recreational vehicle spaces, lodgings or sleeping accommodations furnished to transients by any hotel, motel, inn, condominium, bed and breakfast, **residence or any other place** in which rooms, lodgings or sleeping accommodations are **furnished to transients** for a consideration within the city. Gross proceeds received from the lease or rental of **ACCOMMODATIONS** provided to the same person or persons for a term of more than 30 continuous days are not considered proceeds from transients and shall not be subject to the accommodation fee imposed by this chapter.
>
> **RESIDENT.** Any person who has or shall have the right of occupancy of any rooms, lodgings or sleeping accommodations in the same place for a term of more than 30 continuous days.
>
> **TRANSIENT. Any person seeking accommodations for a temporary period of time, not to exceed 30 days.**

See Folly Beach Code of Ordinances § 113.02 (emphasis added).

Similarly, state law imposes a sales tax of 7% of proceeds from the rent of "any rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any . . .

hotel, inn, tourist court, tourist camp, motel, campground, residence, or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration." *See* S.C. Code § 12-36-920(A). The state tax does not apply "where the facilities consist of less than six sleeping rooms, contained on the same premises, which is used as the individual's place of abode." *See* S.C. Code § 12-36-920(A)(1). In sum, state and local governments tax business lodging activity, not "residential" activity. The Folly Beach tax demonstrates that the local government authority has determined that short-term rentals are a taxable business.

For these reasons, it is apparent that the short-term rental of Units at Mariner's Cay is a "business activity," which is forbidden under the Master Deed.

2. Although There Is a Split Among the States on This Issue, the Most Well-Reasoned Cases Support the Conclusion That Short-Term Rentals of Accommodations to Transient Guests Is a "Business Activity," Not a "Residential Use."

Plaintiffs will likely cite a number of out-of-state cases to support their argument that the short-term vacation rental of Units (irrespective of the particular facts and circumstances) is a "residential use" that does not constitute a "business activity" under the Master Deed. While there is a broad range of judicial decisions, the HOA submits that the best-reasoned cases that advance the interests of property owners conclude that short-term rentals are businesses, not permissible residential uses. Under those cases, short-term rentals are viewed as commercial due, in part, to the non-residential nature of such rentals:

> [T]he nature of Plaintiff's use of the Property is not residential. Though Plaintiff argues that this case is distinguishable from *Teffeteller* because renters are not using the Property "like a motel," there is no meaningful difference between how renters in *Teffeteller* used that property and how Plaintiff's renters use his property. The undisputed facts establish that immediately after purchasing his lot in 2015, Plaintiff engaged Center Hill Chalets, a property management company that leases the Property as a short-term vacation rental for those visiting the area. It is also undisputed that Center Hill Chalets advertises Plaintiff's lot on as many as 25 different short-term vacation rental websites, requiring a minimum of a two-night stay and a maximum of 28 nights. To facilitate each rental, the management company provides key code access to short-term renters to access Plaintiff's cabin as well as laundry and cleaning services. It also provides concierge services for the renters. After each rental, the management company resets the cabin in

> preparation for the next renter. When considered in concert, these facts clearly show that Plaintiff's renters are using the Property for "the most temporary convenience of shelter in the course of a brief stay in the area." [Citation omitted.]

See Pandharipande v. FSD Corp., No. M2020-01174-COA-R3-CV, 2022 Tenn. App. LEXIS 172, at *16-18 (Ct. App. Apr. 29, 2022); *accord Eager v. Peasley*, 322 Mich. App. 174, 181, 911 N.W.2d 470, 474 (2017) ("The terms 'private occupancy only' and 'a private dwelling' coupled with the prohibition against 'commercial use' in the restrictive covenant are clear and unambiguous, and defendant is prohibited from renting the property on a transient, short-term basis.").

Another court has concluded short-term rentals are like hotels which provide transient accommodations, not true "residences":

> The fact that the restrictions permit rentals does not render the restrictions ambiguous insofar as this case is concerned. The issue before us is whether Gadd's renting on a short-term, transient basis is permitted under the restrictions. The clear answer is "no." We have no difficulty concluding that short-term rentals are prohibited because Gadd's advertising of such rentals renders his property the equivalent of a hotel, which is not a permitted use on his lot. . . . The Court of Appeals' and Gadd's emphasis on residential uses — eating, sleeping, reading a book, watching TV — misses the point of the restrictions.

See Hensley v. Gadd, 560 S.W.3d 516, 525 (Ky. 2018).

The HOA respectfully submits that the Court should apply this line of cases because it best supports the interests of the community, is consistent with local laws, and is more logically sound. The referenced Master Deed provisions seek to prohibit business and the negative impacts that often accompany commercial enterprises: high traffic, members of the public entering the property without an ownership or other interest in the community, and the need for excessive people to enter the property to service (cleaning, contractors, etc.) the short-term rental business. These are the reasons why the HOA wants to control short-term rentals. There have already been many instances in which short-term rentals have harmed the overall nature of the community.

For the foregoing reasons, the trial court erred in granting Plaintiffs' Motion for Summary Judgment and Motion to Amend Complaint and in denying the HOA's Motion for Partial Summary Judgment.

C. The Trial Court Should Have Dismissed Plaintiffs' Claims Because They Could Only Challenge the Temporary Moratorium Via a Derivative Action.

1. The Nonprofit Corporation Act Precludes Plaintiffs' Claims as Pleaded, Because They May Only Challenge Corporate Actions of the HOA as *Ultra Vires* Via a Derivative Action.

The trial court further erred in entering the subject orders because Plaintiffs' claims are premised on the contention that the HOA engaged in *ultra vires* acts in adopting the Temporary Moratorium — *i.e.,* that it exceeded limitations under its governing documents and the South Carolina Nonprofit Corporation Act. Irrespective of whether the HOA's Board of Directors properly adopted the Temporary Moratorium, this lawsuit was not the appropriate procedural vehicle for Plaintiffs to challenge the validity or enforceability of the Temporary Moratorium. Instead, Plaintiffs should have satisfied the stringent requirements for bringing a member's derivative action challenging that corporate action.

Under South Carlina law, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. [Citations omitted.] A corporation's actions taken within the scope of the powers granted it are considered intra vires acts; acts beyond the scope of its powers, however, are ultra vires acts." *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). "[A]ll corporate powers [of a nonprofit corporation] must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." S.C. Code § 33-31-801(b). That is what Plaintiffs' Amended Complaint alleges: that the law and governing documents did not authorize the HOA Board to enact the Temporary Moratorium.

Under the South Carolina Nonprofit Corporation Act, a corporate action may only be challenged or attacked as being *ultra vires* in a *derivative* action (and, in that instance, only in an action to prospectively enjoin the allegedly *ultra vires* act):

(a) Except as provided in subsection (b), *the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.*

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or *by a member or members in a derivative proceeding.*

See S.C. Code § 33-31-304 (emphasis added); *accord Williamson v. Bermuda Run Investor Devel. Grp.*, 2006 WL 7286063 (Ct. App. June 13, 2006) (dismissing claim of *ultra vires* acts where member did not commence as derivative action).

The Official Comment to this provision makes clear, from the onset, that it is intended "to do away with the *ultra vires* doctrine." *See* S.C. Code § 33-31-304, Official Comment. The South Carolina Reporter's Comments state that "a member of a nonprofit corporation has *no right to bring a direct attack against a proposed action.* The claim may *only be brought derivatively.* If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted 'ultra vires,' the members may bring a *derivative* action against the alleged wrongdoers." *See* S.C. Code § 33-31-304, S.C. Reporter's Comments (emphasis added).

Plaintiffs have sued in their own rights; they have not commenced a members derivative suit against the HOA. They did not comply with (or even mention) the requirement of South Carolina Rule of Civil Procedure 23(b)(1). They have not made the allegations necessary to support bringing this action on a derivative basis. Plaintiffs have brought this lawsuit in their individual capacities to enforce their own rights. As a result, the South Carolina Nonprofit Corporation Act bars them from asserting that any action of the HOA was *ultra vires.*

For the foregoing reasons, the Court should reverse and vacate the trial court's subject orders because this action should have been brought as a derivative action. In addition, it should grant the HOA's Motion for Partial Summary Judgment and dismiss all claims against the HOA for equitable or legal relief.

2. Contrary to Plaintiffs' Anticipated Argument, They Are Truly Claiming *Ultra Vires* Actions of the HOA and its Board.

Plaintiffs have argued (and alleged in their Amended Complaint) that Section 33-31-304 does not apply because they do not claim *ultra vires* action, but rather allege unlawful acts or breaches of duties by the HOA or its Board of Directors:

> Plaintiffs' claims herein are based upon unlawful action by the Board, not upon whether the corporation lacks or lacked power to act. Accordingly, Plaintiffs may lawfully and properly prosecute this action in its current form as stated in the herein Amended Complaint, and are not required by any rule or law to assert the herein claims as a derivative action.

(See R. p. 349 ¶ 32).

This is inconsistent with Plaintiffs' other contentions in this case. For example, this is a departure from the Plaintiffs' argument in their Memorandum in Support of Motion for Summary Judgment that the "Board of Defendant Mariner's Cay has acted *ultra vires* by imposing a moratorium addressing whether Owners may rent their units on a short-term basis, and thus Defendant [the HOA] is in breach of the Master Deed." (*See* R. p. 319). Plaintiffs stated in that Memorandum that "the Board has acted *ultra vires* and thus cannot be protected under the business judgment rule." (*See* R. p. 323). It would be disingenuous for Plaintiffs to now distance themselves from the position they repeatedly asserted in filings before the trial court: *i.e.*, that they were alleging *ultra vires* actions with regard to the Temporary Moratorium.

Plaintiffs' claim is (and has always been) that "[b]y imposing a purported 'moratorium' on short-term rentals of units without amending the Master Deed as would be required to impose any such restriction, the Association, acting through the Board, has violated and breached the Master Deed." (*See* R. p. 52 ¶ 31; R. p. 350 ¶ 38). This is the textbook definition of an *ultra vires* claim. The Board of an owners' association may exercise powers granted to it by law, the master deed, and any bylaws made pursuant thereto; any act beyond the scope of those powers is *ultra vires*. *See Trost v. Sea Mark Tower Prop. Owners Ass'n*, No. 2004-UP-284, 2004 S.C. App. Unpub. LEXIS 313, at *6 (Ct. App. Apr. 29, 2004). From the onset, Plaintiffs' argument

has consistently been that: (a) HOA Board action could not restrict short-term rentals; and (b) any restriction on short-term rentals must be via amendment of the Master Deed.

The Amended Complaint clearly alleges that the Temporary Moratorium was beyond the authority of the HOA and its Board under, *inter alia*, the Master Deed: "[t]he Board discretion provided in Article IX, Section 7 is unambiguously limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his or her immediate family, may occupy a unit under a lease." (*See* R. p. 343 ¶ 12). It further alleges that that this section of the Master Deed "does not grant to the Board broad, unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals." (*See* R. p. 344 ¶ 13). Plaintiffs conclude that the Temporary Moratorium is improper because it is "unambiguously and narrowly limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his immediate family, may occupy a unit under a lease." (*See* R. p. 347 ¶ 26). The Amended Complaint also asserts that "every mandate that the owners in Mariner's Cay are required to follow under the recorded governing documents must necessarily be either (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation that the Board is authorized to promulgate under Article III, Section 3, subsection (e)." (*See* R. p. 346 ¶ 22). Plaintiffs further alleged that the Temporary Moratorium "is not a permissible rule or regulation, as it does not seek to only limit 'the use of the General Common Area and Facilities'; instead it clearly and overtly seeks to limit or restrict the owners' use of their units." (*See* R. p. 347 ¶ 25). The Amended Complaint additionally alleges that "short-term rentals . . . cannot be properly or accurately characterized or deemed a business activity in violation of any provision of the Master Deed." (*See id.* ¶ 27).

At the end of the day, Plaintiffs' Amended Complaint — like their original Complaint and summary judgment filings — asserts that the HOA (and its Board) did not have the legal power to adopt the Temporary Moratorium. In other words, Plaintiffs claim that the Board *exceeded its legal authority* under the HOA's governing documents. The Amended Complaint is plainly premised upon allegedly *ultra vires* acts, *i.e.*, that the HOA (and its Board) exceeded its

legal powers. Because Plaintiffs' claims are based on allegations of *ultra vires* actions, they could bring a ***derivative*** suit to enjoin future action — not a direct action for retrospective equitable relief or money damages. Plaintiffs' original Complaint and Amended Complaint do not make a single derivative allegation. As a result, the trial court should have denied Plaintiffs' Motion for Summary Judgment and should have granted summary judgment to the HOA, dismissing the claims against it.

D. Even If Plaintiffs Are Correct That Their Amended Complaint Alleges *Intra Vires* Actions, the Circuit Court Erred in Failing to Apply the Business Judgment Rule

As discussed above, in their Amended Complaint, in an effort to avoid the prohibition of direct claims of *ultra vires* acts, Plaintiffs alleged that their claims do not challenge the HOA's authority to act. Instead, they now claim that they allege that the HOA or its Board breached a duty while acting within their granted powers (*i.e., intra vires* actions). Even if the Amended Complaint asserted claims for breaches of duties in connection with *intra vires* corporate actions, Plaintiffs' claims would fail because the challenged conduct would be insulated under the business judgment rule.

"A court should be reluctant to question action taken intra vires by the governing board of a non-profit corporation." *Dockside Assocs. v. Detyens*, 291 S.C. 214, 216, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987). South Carolina statutes set forth the duties applicable to a director of a nonprofit corporation:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;

> (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;
>
> (3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; . . .
>
> (d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

See S.C. Code § 33-31-830.

"Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority, and it acts without corrupt motives and in good faith." *Village W. Horizontal Prop. Regime v. International Sales & Mktg. Grp.*, No. 2007-UP-111, 2007 S.C. App. Unpub. LEXIS 134, at *10 (Ct. App. Mar. 7, 2007) (*citing Detyens, supra*). "'In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.'" *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) (*quoting Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993)).

In this case (if Plaintiffs challenge the Temporary Moratorium as being *intra vires*), the business judgment rule would protect the adoption of the Temporary Moratorium. Plaintiffs cannot challenge the wisdom or correctness of the Board's action. The Court should not second-guess the HOA Board's determination of how to regulate short-term rentals. The Amended Complaint (and original Complaint) does not allege that the HOA acted in bad faith or with a dishonest motive in enacting the Temporary Moratorium. It does not allege that the Board members did not act in the manner that they believed was in the best interests of the HOA. It does not allege that the Board did not act with reasonable prudence in enacting the Temporary

Moratorium. It does not allege that the Temporary Moratorium was harmful to a majority of the members of the HOA.

Therefore, for the foregoing reasons, the Court should reverse and vacate the trial court's grant of Plaintiffs' Motion for Summary Judgment and Motion to Amend Complaint and denial of the HOA's Motion for Partial Summary Judgment.

E. <u>Irrespective of Whether Short-Term Rentals Are Permissible Residential Uses, the Temporary Moratorium Was a Valid and Enforceable Corporate Action of the HOA.</u>

Even if the Court disagrees with the HOA and determines that short-term rental of Units is a "residential use" (not a "business activity"), the HOA (through its Board of Directors) was authorized under South Carolina law and its governing documents to regulate rentals in Mariner's Cay. In other words, even if short-term rentals are allowed under the Master Deed, the Temporary Moratorium is a permissible exercise of the HOA Board's authority. As a result, the trial court erred in granting the relief requested by Plaintiffs.

"A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). South Carolina law enumerates the powers of a nonprofit corporation, including (but not limited to):

> (11) to elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation; . . .
>
> (15) to impose dues, assessments, and admission and transfer fees upon its members;
>
> (16) to establish conditions for admission of members, admit members, and issue memberships;
>
> (17) to carry on a business;
>
> (18) to *do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.*

See S.C. Code § 33-31-302 (emphasis added).

The By-Laws of the HOA provide for and grant the following broad powers to its Board of Directors:

> The Board of Directors *shall manage and direct the affairs of the Association* and, subject to any restrictions imposed by law, by the Master Deed, or these By-Laws, may exercise all the powers of the Association. The Board of Directors shall *exercise such duties and responsibility as shall be encumbent (sic) upon it by law, the Master Deed, or these By-Laws as it may deem necessary or appropriate in the exercise of its powers*, including, without limitation, the collection of assessments and charges from the owners, the establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities, and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Camon Area and Facilities.

(*See* R. p. 259 ¶ V.2 (emphasis added)).

In addition to the foregoing *general* grants of authority, the Master Deed also *expressly authorizes* the HOA's Board to regulate and restrict the rental of Units at Mariner's Cay. Specifically, the Master Deed states that "no less than all of a" Unit "may be rented provided the occupancy is only by the lessee and his immediate family *unless otherwise provided by the Association's Board of Directors*." (*See* R. p. 229 ¶ IX.7(emphasis added)). This language expressly allows the HOA's Board of Directors to prohibit, in its discretion, the rental of Units. This provision does not require an amendment to the Master Deed. It does not require a membership vote. Rather, it empowers the HOA's Board to take action concerning the regulation of rentals. The Board exercised its power under Section IX(7) of the Master Deed when it enacted the Temporary Moratorium on short-term rentals by new owners. Notably, the Temporary Moratorium does not outright prohibit rentals. It merely limits the short-term vacation rental of property, which negatively impacts other owners and the overall character of the community. New owners remain free to rent out their properties for periods longer than 30 days without limitation. (See R. p. 268 (limiting rentals of "less than 30 consecutive days in exchange for monetary consideration")).

Plaintiffs contend that Section IX(7) of the Master Deed only allows the HOA's Board to regulate the limited subject of whether rental occupancy will be limited to the lessee and his

immediate family. In other words, Plaintiffs construe "unless otherwise provided by the Association's Board of Directors" as: (a) only modifying "provided the occupancy is only by the lessee and his immediate family"; and (b) *not* modifying in any way "Units may be rented."

Presumably, Plaintiffs base this construction on the "last antecedent rule" (perhaps also relying on the absence of a comma before "unless" in this provision of the Master Deed).

> The last-antecedent rule generally applies where a statute contains a list, "reflect[ing] the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016). And the canon doesn't apply when "the modifier directly follows a concise and 'integrated' clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S.Ct. 1061, 1077, 200 L. Ed. 2d 332 (2018). Here, the phrase "the provisions of any other Federal statute," 42 U.S.C. § 2000d-7(a)(1), "hangs together as a unified whole, referring to a single thing (a type of [provision])," *Cyan*, 138 S.Ct. at 1077. Thus, "the most natural way to view the modifier is as applying to the entire preceding clause." *See id.* (eschewing the last-antecedent rule to apply the modifier to the entire phrase "[a]ny covered class action brought in any State court involving a covered security," rather than the partial phrase "involving a covered security" (emphasis added)).

See Kadel v. North Carolina. State Health Plan Teachers & State Employees, 12 F.4th 422, 443 (4th Cir. 2021). As the United States Supreme Court wrote in *Cyan*, the "last antecedent rule" does not apply to a single, integrated clause:

> because that clause hangs together as a unified whole, referring to a single thing (a type of class action). Consider the following, grammatically identical construction: "The woman dressed to the nines carrying an umbrella, as shown in the picture . . ." Would anyone think that "as shown in the picture" referred to anything less than the well-attired and rain-ready woman? No. And so too here, the modifier goes back to the beginning of the preceding clause. The rule of the last antecedent is not to the contrary. . . . [W]e have not applied the rule when the modifier directly follows a concise and "integrated" clause.

See Cyan, 138 S. Ct. at 1077.

The HOA respectfully submits that Plaintiffs' reading of Section IX(7) of the Master Deed is incorrect. The phrase "unless otherwise provided by the Association's Board of Directors" does not follow a list of separate clauses; rather; it follows an integrated description of a single concept concerning the rental of Units. The language of the Master Deed makes clear

that the phrase "Units may be rented provided the occupancy is only by the lessee and his immediate family" is an integrated, single concept. That concept is that the only permissible rentals are to families (not to groups of unrelated single people). This is not a list; it is a single item. As a result, the "unless otherwise provided by the Association's Board of Directors" applies to that entire singular concept, not to only one portion of it. The last antecedent rule applies where the language provides multiple options: A, B or C. That is not the case here, since Section IX(7) only involves a single concept. Therefore, the "last antecedent rule" does not apply here.[9]

Plaintiffs previously cited this Court's unpublished opinion in *Brown v. Spring Valley Homeowners Ass'n*, 2016 S.C. App. Unpub. LEXIS 406 (Ct. App 2016), "for the proposition that any action by the Homeowners Association or its Board of Directors must be authorized by the restrictive covenants." (*See* R. p. 139). In other words, they contend that the Master Deed must expressly state that the HOA's Board can regulate or prohibit short-term rentals. However, in *Brown*, this Court rejected an argument that fines were not expressly authorized under restrictive covenants:

> We find no merit to Homeowner's argument that the restrictive covenants do not authorize the imposition of fines. The restrictive covenants require Homeowner to become a member of the Association and to abide by the Association's rules, regulations, and bylaws. These rules, regulations, and bylaws, which in turn authorize the imposition of fines, also constitute the contract between the Association and its members. *Therefore, the restrictive covenants indirectly authorize the imposition of fines.*

See id., at *9 (emphasis added). Accordingly, nothing in *Brown* would require that the HOA's Temporary Moratorium be specifically or expressly authorized by the Master Deed.

In light of the foregoing, the South Carolina Nonprofit Corporation Act, the HOA By-Laws, and the Master Deed all permitted the HOA's Board broad powers, including the power to

---

[9] Moreover, the Court should not be swayed by the presence or absence of a comma. *See State v. Pilot Life Ins. Co.*, 257 S.C. 383, 391, 186 S.E.2d 262, 266 (1972) ("'The presence or the absence of a comma, according to the whim of the printer or proofreader is so clearly fortuitous that it is wholly unsafe as an aid to statutory interpretation.'" (*quoting Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917))).

regulate the rental of Units by owners. The trial judge erred in concluding that the HOA's Board did not have such authority. Therefore, this Court should reverse and vacate Judge Scarborough's March 29 and April 17, 2023 Orders granting Respondents' Motion for Summary Judgment and Motion to Amend Complaint and denying the HOA's Motion for Partial Summary Judgment.

F. None of the Plaintiffs Who Owned Their Properties at the Time the Temporary Moratorium Was First Enacted Possess Standing to Assert Any Claims

All of the original Plaintiffs and most[10] of the current Plaintiffs named in the Amended Complaint owned their properties at the time the first Temporary Moratorium went into effect.

The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006), *quoted in Powell v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008). "One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id. Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 291-92 (2011) ("In other words, the party seeking relief must have a real, material, or substantial interest in the litigation, not a merely nominal or technical one.").

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in

[10] Specifically, Plaintiffs/Respondents Plaintiffs Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, and Brianna Stello owned their properties before the effective date of the Temporary Moratorium. (*See generally* R. pp. 341-55). The Amended Complaint alleges that Plaintiffs Jennifer Sellars and Dominique Powell "purchased their units after July 1, 2019 and as such, have been prevented from renting their units on a short-term basis" under the Temporary Moratorium.

fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *See Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Commander Health Care Facilities, Inc. v. South Carolina Dep't of Health & Envtl. Ctrl.*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *See Freemantle v. Preston*, 398 S.C. 186, 192-93, 728 S.E.2d 40, 43 (2012) (citations omitted).

The Temporary Moratorium (in all of its iterations) limited itself to "new owners" who obtained their properties after July 1, 2019. (*See* R. p. 268). As a result, the Temporary Moratorium would have no direct impact on any of the original Plaintiffs and would not have limited their ability to lease their Units on a short-term basis. At all times, all Plaintiffs (except for Sellars and Powell) have been able to rent their Units for periods of less than 30 consecutive calendar days. The Temporary Moratorium has had no impact on their actions and does not apply to them. The original Plaintiffs all alleged in the original Complaint that they owned Units at Mariner's Cay at the time of the filing of the Complaint, *i.e.*,, June 24, 2019. (*See* R. p. 46 ¶ 4). This was before the July 1, 2019 effective date of the Temporary Moratorium. Those Plaintiffs can rent their Units to vacationers. So long as they comply with the Master Deed and other governing documents, the Temporary Moratorium has no direct impact on Plaintiffs' (save Sellars and Powell) use of their Units. As a result, they have not suffered a concrete injury that would support them having standing.

In an effort to manufacture standing, Plaintiffs' Amended Complaint alleges that they may bring this action pursuant to the following provision of the Master Deed:

> Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be

> lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner.

(*See* R. p. 349 ¶ 34 (*quoting* Master Deed Article XI, Sec. 6)). They further allege that, even though the Temporary Moratorium does not apply to them, "it nonetheless indisputably does affect, injure and damage all current owners, including Plaintiffs, regardless of whether they purchased their units before, on or after July 1, 2019, as said purported moratorium impairs and hinders current owners' ability to sell their units and diminishes the property value of the current owners' units." (*See* R. p. 349-50 ¶ 36). They additionally allege that they have a vested right to rent their properties and that they "have the ability to convey that vested right to a purchaser, a right which has appreciable monetary value." (*See* R. p. 350 ¶ 37). However, because they are not themselves subject to the Temporary Moratorium, it is impossible for Plaintiffs to show they have standing with regard to the equitable (or legal) claims against the HOA.

Plaintiffs argue that — even though the Temporary Moratorium does not apply to them — they were harmed and possess standing because the Temporary Moratorium decreases their property values or infringes on their ability to market and sell their Units. However, Plaintiffs have not presented any competent and admissible evidence that the Temporary Moratorium has actually had any impact on property values or their ability to sell their Units. To the contrary, the evidence shows that Mariner's Cay units are selling briskly for profits. (*See* R. p. 200). Any claimed impact on Plaintiffs' property values is theoretical and speculative.

The only evidence submitted to support the original Plaintiffs' claims of standing was the July 15, 2022 Affidavit of Leonardo Cornejo in Support of Motion for Summary Judgment. In that Affidavit, Mr. Cornejo stated that he purchased Units at Mariner's Cay with the intention of leasing them out on a short-term and that he would not have purchased them if he could not rent them out on a short-term basis. (*See* R. pp. 334-35 ¶¶ 5-6). He then vaguely asserted that he

sold one of his Units for a lower price[11] than his original asking price because of the Temporary Moratorium:

> 10. In 2021, I had to drastically lower the price of one of my units in order to sell it.
>
> 11. I originally listed the unit for $359,000. Prospective buyers had expressed interest in buying my unit, but then rescinded their interest after being made aware of the moratorium restricting their ability to lease units on a short-term basis. Thereafter, I had to drop the price by $34,000, eventually selling my unit for $335,000. I also was forced to add incentives, including paying the first 6 months of the buyer's HOA assessments, totaling nearly $5,000.
>
> 12. This occurred during the hottest seller's market in the history of South Carolina, when prices were spiking and bidding wars were resulting in cash offers above the listing price. However, due to Defendant's actions in violation of the Master Deed, I was forced to drop the price of my unit by some 9 percent.
>
> 13. I have direct knowledge that other owners experienced similar results, i.e., having to reduce their asking price significantly and add incentives in order to sell their units.

(*See* R. pp. 335-36 ¶¶ 10-13).[12]

Mr. Cornejo's affidavit does not present admissible evidence that could support Plaintiffs' standing argument. The South Carolina Rules of Civil Procedure require that an affidavit supporting or opposing a motion for summary judgment "shall set forth such facts *as would be admissible in evidence*." *See* Fed. R. Civ. P. 56(e). "Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). The key portions of Mr. Cornejo's affidavit are inadmissible hearsay. Most importantly, the affidavit relies on the hearsay of unnamed "[p]rospective buyers" concerning

---

[11] Mr. Cornejo actually sold his Unit at a substantial profit. He purchased the unit in 2015 for $249,900, and sold it five years later in 2021 (two years after he was aware of the Temporary Moratorium) for $335,000, a profit of $85,100.

[12] The trial court did not permit the HOA to conduct any discovery concerning the details of Mr. Cornejo's vague affidavit. As a result, the HOA never learned the details of the alleged prospective buyer and could not verify Mr. Cornejo's hearsay account of what the purchaser allegedly said.

their interest in purchasing his Unit and the impact of the Temporary Moratorium on those buyers' interest. He also claims that he has "direct knowledge" of other owners experiencing the same thing. However, his knowledge of those transactions would necessarily also constitute inadmissible hearsay. If Plaintiffs' base their standing argument on alleged harm to their ability to sell their properties, they had the obligation to present specific, *admissible evidence* to support this claim. They did not do so.

Moreover, Respondents have not presented *any* evidence regarding any Plaintiff other than Mr. Cornejo. Again, in the face of a legitimate challenge to standing, it was incumbent on Plaintiffs to present actual evidence of a concrete injury in fact that would support standing. Aside from Mr. Cornejo's defective affidavit, there is no such evidence.

As a result of the foregoing, the trial judge erred in concluding that the original Plaintiffs (*i.e.*, all Plaintiffs except for Sellars and Powell) had standing to bring their claims concerning the Temporary Moratorium.

G. The Claims of Plaintiffs Sellars and Powell Must Fail Because They Purchased Their Properties With Record Notice of the "Temporary Moratorium."

The HOA argued before the trial court that new Plaintiffs, Sellars and Powell (and anyone else who have purchased their property after the effective date of the Temporary Moratorium), cannot assert valid claims because they purchased their Units with full record notice of the Temporary Moratorium. "The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim." *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006); *accord* S.C. Code § 30-9-40 ("The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record."). As a result, Plaintiffs Sellars and Powell are deemed to have purchased their properties with constructive knowledge of the Temporary Moratorium. As a result, they cannot now challenge the propriety of the Temporary Moratorium.

By purchasing their Units with constructive knowledge of the Temporary Moratorium, Plaintiffs Sellars and Powell waived any challenge to the Temporary Moratorium. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). In this matter, the Plaintiffs Sellars and Powell purchased their Units with record notice of the Temporary Moratorium. Doing so, they waived any right to challenge the validity of the Temporary Moratorium. Because they had record notice of the Temporary Moratorium when they purchased their Units, Plaintiffs Sellars and Powell may not now use the courts to challenge it.

Therefore, this Court should reverse and vacate the trial court's orders granting Respondents' Motion for Summary Judgment and Motion to Amend Complaint and denying the HOA's Motion for Partial Summary Judgment.

H. <u>In the Alternative (and Particularly in Light of Its Ruling on Plaintiffs' Motion to Amend the Complaint), the Circuit Court Should Have Deferred Ruling on the Parties' Motions for Summary Judgment and Permitted the HOA to Engage in Full Discovery.</u>

South Carolina law allows parties a full and fair opportunity to complete discovery. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has a had a full and fair opportunity to complete discovery." *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Matter of Estate of Smith*, 419 S.C. 111, 123, 796 S.E.2d 158, 164 (Ct. App. 2016) (*citing Schmidt v. Courtney*, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003) (internal quotation marks omitted)).

In the trial court, the HOA contended that summary judgment in favor of Plaintiffs was premature because it was entitled to conduct discovery as to the issues raised against it. This concern is particularly stark here, where the Order granting Plaintiffs' Motion for Summary Judgment *also granted a motion to amend* the Complaint to add new Plaintiffs Sellars and Powell — who were and are the only Plaintiffs who purchased properties after the effective date of the Temporary Moratorium and, as a result, were prohibited from renting their Units on a short-term basis. As a result, the only two Plaintiffs who were actually subject to the Temporary Moratorium were not parties to this case until the moment the trial court granted summary judgment. Consequently, the HOA was ***never*** given any opportunity to conduct discovery as to their claims.

The HOA argued below that, by adding new Plaintiffs to this case, the trial court was essentially starting the case anew, requiring that it be permitted to conduct discovery:

> From our perspective, ***this starts out almost like a new case***. Some of the issues will be the same. We've lost I think 13 plaintiffs. So we've got a new complaint we've got to answer and deal with it. We have new allegations we have to deal with.
>
> And finally I would say as to these four new plaintiffs, I hope my argument illustrates how important discovery would be because their knowledge will be critical as to whether or not they have standing, and even if they have standing, can they maintain a claim under these circumstances. And who they bought from, what they were told, all of that stuff, we would suggest it's going to be important in determining whether or not they can maintain the claim as pled.

(*See* R. p. 499:5-20 (emphasis added)). The HOA's attorney requested that the trial court defer ruling on summary judgment so it could "answer the current complaint and we know what we're dealing with in terms of which plaintiffs are in or out" and contended that "we have the right to answer that [the Amended Complaint] and properly frame the issue." (*See* R. pp. 510:23-511:5). Without having the chance to answer the Amended Complaint and conduct discovery as to that pleading, the HOA contended that it would be arguing "sort of hypotheticals" to the trial court. (*See id.*). The trial court rejected this argument and moved forward with summary judgment, even though the HOA had not even answered a complaint as to some of the Plaintiffs and never

had the chance to conduct discovery as to new Plaintiffs. At the very least, the trial court should have permitted the HOA an opportunity to engage in discovery as to these two entirely new Plaintiffs.

Aside from the HOA's inability to conduct *any* discovery as to the new Plaintiffs, the HOA requested — before the trial court ruled on the pending motions — the opportunity to obtain information related to all Plaintiffs' short-term business activity, including (but not limited to) short-term rental income, business licenses, and information about short-term renters. The information sought was relevant to the pending motions and necessary to the merits of the parties' claims. The HOA limited its discovery requests to information directly related to the details of the short-term rental process and income. The information sought would have allowed the HOA to investigate several issues relevant to whether short-term rentals violated the Master Deed:

- The volume of Plaintiffs' rentals and the short-term rental rates charged;
- Plaintiffs' marketing of their Units for short-term rentals;
- How Plaintiffs provide renters access to the building and common areas;
- Whether Plaintiffs comply with the Master Deed's limitation of rental occupancy to the lessee and his immediate family;
- How Units are prepared for rentals; and
- What business formalities (including licensures, and the manner of accounting for revenues) Plaintiffs' follow.

Plainly, the manner in which Plaintiffs rented out their Units — including the volume of rentals and the existence of indicators of a business (such as a business license) — would have been salient to whether the short-term rentals here were "residential uses" or "business activities."

The HOA served robust discovery requests to Plaintiffs addressing all of those issues. Plaintiffs filed a February 21, 2022 Motion and Incorporated Memorandum to Quash Discovery or in the Alternative Protective Order objecting to much of the HOA's discovery requests concerning their short-term rental businesses. (*See* R. pp. 132-54). However, the trial court

ruled on the parties' cross-motions for summary judgment without ruling on that motion or allowing the HOA to conduct discovery as to the key issues in this case (particularly discovery relevant to whether the short-term rentals at issue were "businesses").

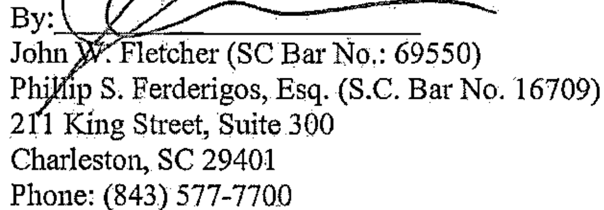
Thus, the trial court should have deferred ruling on the parties' cross-motions for summary judgment and should have compelled Plaintiffs' to provide complete responses to the HOA's discovery requests.

CONCLUSION

For the reasons set forth above, the Court should reverse and vacate the Circuit Court's: (a) March 29, 2023 Order granting Respondents' Motion for Summary Judgment and Motion to Amend Complaint and denying Appellant's Motion for Partial Summary Judgment; and (b) April 17, 2023 Form 4 Order denying Appellants' Motion to Alter or Amend. The Court should direct the entry of partial summary judgment in favor of Appellant as to all equitable and declaratory judgment claims.

December 19, 2023

BARNWELL WHALEY PATTERSON &
HELMS, LLC



By:
John W. Fletcher (SC Bar No.: 69550)
Phillip S. Ferderigos, Esq. (S.C. Bar No. 16709)
211 King Street, Suite 300
Charleston, SC 29401
Phone: (843) 577-7700

- and -

PARKER POE ADAMS & BERNSTEIN, LLC
Robert H. Jordan, Esq.
850 Morrison Drive
Suite 400, Charleston, SC 29403
Phone: (843) 727-2650
Attorneys for Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 08 2024
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer Sellars, Dominique Powell, Jennifer Mayo and James Hardy........................ Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. ....Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

BARNWELL WHALEY PATTERSON & HELMS, LLC
By:____________________
John W. Fletcher (SC Bar No.: 69550)
Phillip S. Ferderigos, Esq. (S.C. Bar No. 16709)
211 King Street, Suite 300
Charleston, SC 29401
Phone: (843) 577-7700

- and -

PARKER POE ADAMS & BERNSTEIN, LLC
Robert H. Jordan, Esq.
850 Morrison Drive
Suite 400, Charleston, SC 29403
Phone: (843) 727-2650
Attorneys for Appellant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc.